United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2175

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for the

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In the Matter of

ZALMEN A. DUNN,
Bankrupt.

ZALMEN A. DUNN,
Bankrupt-Appellant,

-against-

SAMUEL A. ARUTT,
Trustee-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK

APPELLEE'S BRIEF

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APPELLEE'S BRIEF

A SHORT REVIEW OF THE PAST LEGAL PROCEEDINGS WHICH SPAN ALMOST 7 YEARS

The bankrupt is a practicing dentist. He escaped denial of his discharge on an earlier appeal despite his fraud and chicanery because the false statements from which the present objection is an outgrowth as this Court had said that his scheme was manifestly to obtain credit for

Mid-Island and not for the proprietary fund solicitation business in which he may have engaged. His associate, Murry Levy, was denied a bankruptcy discharge. Together they bilked creditors out of $700,000 leaving barely a trace of that money for the trustee of Mid-Island to administer. Subsequently, Judge Rudin decided on the trial of another objection that the references to the same transactions in the bankruptcy schedules constituted a false oath, since all of the judges had found the mortgage and conditional sales agreement covered non-existant property. Chief Judge Mishler, on a review, said of the oath that since the property did not exist, no one could be hurt. Therefore, there was no false oath. Trustee served a notice of appeal but had not prosecuted the same pending the determination of this last objection.

There is but one question for this court to decide, which was put by Chief Judge Mishler as, "that the records of the bankrupt present a misleading picture of the true status of the bankrupt's financial affairs;" he also said, "the bankruptcy judge to sustain the objection of specification must find that the actual amount of the bankrupt's claim against Mid-Island cannot be substantially ascertained by reference to his records." (26A)

Judge Rudin found that the array of evidence reached one inexorable conclusion, that Dunn's books and records were insufficient to give the Trustee and his creditors a true insight into the handling of the money he had purloined in this old Ponzi scheme, nor did he have records to sustain his claim that he had invested $123,000 in Mid-Island. (34A)

By agreement of the parties, Judge Rudin made new findings completely ignored by counsel. (28A)

TRUSTEE'S CASE

Trustee produced an imposing array of documents, each and every one extracted from the bankrupt, contradicting Dunn's claims to the $123,000. Trustee established by overwhelming evidence Dunn and Levy concocted devious schemes for fund raising, bilking CIT and First National City Bank such as Levy's adopting the name of Jack Gross, buying high and selling low at a loss for the purpose of building up a mail order business for their mutual gain; swapping checks on a grand scale and/or kiting them; borrowing new funds and writing old lenders that interest and principal payments must be deferred. We can go on endlessly describing their activities which they reinforced with little or no records or if such there were, they contained ill-defined entries.

Over $700,000 was tragically lost. Mid-Island, a bankrupt in this court, liquidated a $50,000 estate for its creditors. Levy left only a nominal estate. There was no accounting for the huge loss by any proper records.

It has been the Trustee's contention that the alleged $123,000 investment claimed by Dunn is merely a device based on a trumped up accounting to account for some of the money which he fleeced from the duped.

When Dunn sent us the October 31, 1966 letter - pre bankruptcy - (ex. 3) (43A) he made no mention of his father's claim of $35,000. (57A) The cards which represent his bookkeeping, his crown jewel of bookkeeping, show conflicting entries and mutilations as to alleged funds he obtained from the estate and what he gave in return. On trial of these issues, he provided no estate records proving it was worth $35,000. In the cards he allegedly gave up his personal Mid-Island notes to his father's estate (53A) without reduction of his claim against Mid-Island. In his bill of particulars detailing the $123,000 claim which was given to the Trustee by court direction, dated September 11, 1967 (ex. 5) (47A), he does not list his father's debt of $35,000 (53A). Nor did he list it in the financial statement he gave to the Security National Bank in July 1965 (58A) to whom he owed a very substantial sum (ex. 1), p. 11 in minutes of November 15, 1971. In that financial statement he claimed Mid-Island owed him $67,000. In the following year, in his Federal tax return filed September, 1967, after his bankruptcy - (ex. 2) p. 17 minutes of November 15, 1971 (41A), he specifically noted his loss in Mid-Island as $67,000 and took that sum as a loss to mitigate his tax on professional income (41A). Said tax return shows no deductions for depreciation for the CIT - First National City dental equipment (44A); nor do the returns of the prior two years.

To cap it all, we refer to his brother-in-law's audit. His brother-in-law is Tesser, an accountant. In evidence, before the court, introduced in the minutes of December 28, 1971 (ex. 8) (63A), and

referred to by the Bankruptcy Judge in his decision on page 7 (34A), which showed Dunn to be a creditor for $51,333.97. This report was made by Tesser about one-half year before Dunn filed Bankruptcy when creditors were already in pursuit of him, Levy and Mid-Island. Dun says it is based on his cards (54A, 55A).

As to Dunn's alleged defense, a series of Mid-Island notes, we question their authenticity. On behalf of the trustee, we say it was Dunn's prime duty on the filing of his bankruptcy petition to turn over all his books and records to the Trustee. What were they doing in his possession? The trial date is 1971 and we challenged these notes in the course of the trial (50A, 56A, 57A, 68A, 71A and 87-88A). We stress the delivery of his prized bookkeeping cards to the Trustee upon request for the records on Trustee's qualification; whereas, these notes never appeared, were never mentioned, until this trial. On this trial we demonstrated that his bill of particulars of his claim was in conflict with the amounts set for the same creditors in his schedules, likewise we showed the conflicts in amounts reflected in his schedules and/or in his bill of particulars with the letter of October 31, 1966. Judge Rudin's opinion emphasizes all of these discrepancies in his records and it is further noteworthy that each one of these exhibits was prepared by him for a specific purpose and as each special occasion arose. These exhibits were not the offspring of extemporaneous expressions. Dunn repeatedly said that all of these exhibits were culled from his cards, based thereon, and that the cards were meticulously kept by him (51A).

CIT and First National City Bank do not appear in the cards. The Industrial Credit Plan, a creditor in his schedules, has no other appearance (33A-34A). Only in one instance does Dunn give us a repetitive figure; that is, the $67,000+ which he lost as stated in his income tax return (41A) which also appears in the statement he gave to the Security National Bank as a sum due him (see 58A and 59A). This sum is in utter conflict with his claim of $123,000.

TRUSTEE'S CONCLUSIONS

There isn't a shred of evidence before this court that he put one nickel into Mid-Island. His cards gave him the lie. They showed some $20,000 in loans in his name for which he got Mid-Island notes, which, in turn, he scratched over to his father's name thereby repaying himself the alleged loans. On this evidence he could never have had a claim on the Mid-Island estate. Mid-Island's trustee did not have to entertain such a claim had it been filed. There has never been submitted proper proof that Dunn was a creditor of Mid-Island. On the facts as produced in this court, a filed claim in Mid-Island would have been expunged for lack of foundation.

COMMENT ON DUNN'S BRIEF

The commentary in the brief of Dunn's counsel is noteworthy only for its sarcasm of Judge Rudin's opinion. It speaks with disdain

about his findings and conclusions, yet Chief Judge Mishler affirmed Judge Rudin's opinion twice. In the same vein they have treated the rules of evidence. Each piece of Trustee's written evidence was produced with the imprimatur of the bankrupt. The letter of October 31, 1966, is relevant as being an admission against interest. Every day pre-court statements obtained from parties and witnesses are received in evidence. Mr. Mann's use of the letter made of it a proper exhibit in evidence. The cards were Dunn's foundation. They were kept by him lovingly. He swore repeatedly that they were intended to mirror all of his borrowings. Sadly they didn't. Tesser's report gave them currency, unfavorable to Dunn. Mr. Mann made this report admissible if it wasn't when offered, by his examination of Dunn as to its contents which he interpreted as supporting Dunn. The so-called documentation supporting his bill of particulars is far short of any verification of his accounting for the debts reflected in his bankruptcy schedules amounting to $700,000. They are refuted by all of the exhibits before the court. Counsel in his brief is disregarding the rules of evidence as set forth in the time-worn horn book series. Every document received in evidence was Dunn's, vouched for as his. He swore that each exhibit was based on his cards, his prime record. To account for the $500,000 to $700,000 he needed these cards plus (34A). Dunn's testimony coupled to the exhibits submitted by the trustee through the interrogation of Dunn dominates this case. This alleged defense is not corroborated in the trustee's cross-examination except for the notes allegedly given to him by Mid-

Island which never surfaced until the date of trial. If the notes had authentic origin they belonged to the Trustee, as did the cards which were turned over to the Trustee upon his appointment. A review of the record made on August 2, 1972 will show that some of the notes which are in the Clerk's file were not made by Mid-Island. Appellant's counsel disregards this extraordinary blunder in appellant's brief, for no excuse is offered. In haste they forgot to inscribe Mid-Island Dental Supply Corp. above the maker's signature. Of course, Mr. Dunn still claimed on cross-examination that they were corporate notes. He thereby discredited his own proof. The lie thus required accommodations. In early examinations conducted by Judge Rudin and Trustee's attorney, he told us that Levy had given him blank notes to complete. He had a stack of these. That he was testifying falsely is reflected at page 191 et seq. minutes of August 2, 1971, the trial of this issue. Beginning at said page Dunn on cross-examination testified: "I took the money from father's estate and put it in Mid-Island," which explains his transfer by endorsement of his $14,000 note of Mid-Island which appears on his card and in Tesser's report. At page 193, looking at the cards, he says, "some of the money may have been loaned to me" - being then confronted with the $14,000 card, the $3,000 and $4,000 cards which had been his, Dunn's, showing the notes endorsed to the estate. There is no $14,000 check produced. At page 200 we made the point that no mention was made of the estate debt because he owed the estate the money and he says, at page 201, he should have put it into the October letter, and

at page 202, he says the cards are the source of the letter. Continuing our quotation from the minutes of that date, we have him stating that, page 202, "Tesser erred in setting up his loss in his 1966 tax return at $67,000," please read pages 203, 204 and 205. At page 206, he says "the cards were the source of the Security National Bank statement where his claim is $67,000" and at page 209, "cards were the source of his schedules." Does this shambles represent books and records from which the trustee can reach an understanding that he had maintained books and records which would qualify under Section 14 of the Bankruptcy Act?

POINT I

CHIEF JUDGE MISHLER DID NOT ERR IN AFFIRMING BANKRUPTCY JUDGE RUDIN.

As to the law on this issue, Judge Rudin's decision sets it forth adequately so that we need not enlarge upon it. The law quoted in appellant's brief in our opinion offers no balm to Dr. Dunn. Ironically, appellant's quote of the opinion of Judge Goldberg applies to honest but unfortunate debtors and not to a man whose character is so distinctly set forth in the appendix as a prodigious prevaricator.

POINT II

APPELLANT'S TESTIMONY AND EXHIBITS ARE IN SUBSTANTIAL AND FATAL CONFLICT; THEIR PROBATIVE VALUE IS VIRTUALLY NIL.

Appellant's case has not been proved; his testimony and exhibits disprove each other and mutually impeach their alleged probative value.

For example:

1) The 1966 Income Tax Return (41A) indicates an investment and loss of $67,693.79. This is in conflict with appellant's letter of October 31, 1966 (43A) which indicates an investment of $83,000.

2) The 1966 Income Tax Return is silent as to CIT and First National City Bank loans and no depreciation was taken for equipment which secured such loans. Thus the Income Tax Return was incomplete, inaccurate and in violation of law and the rules governing perjury.

3) Appellant's bankruptcy petition indicates a debt to his father of $35,000. But this substantial liability has never been referred to in the Appellant's Income Tax Return nor in the Bill of Particulars served on the Trustee, nor in the letter of October 31, 1966; nor is it set forth in his bookkeeping cards (his most important record).

4) Tesser's report gives Dunn a claim of $53,000 against Mid-Island as against the $123,000 which he is claiming.

5) Conflicts of testimony appear on the following pages of the Appendix: 50A, 71A, 87A, 88A, 56A, 57A, 68A.

POINT III

JUDGE RUDIN'S CONCLUSION THAT THE BANKRUPT'S RECORDS DO NOT MEET THE STANDARD REQUIRED BY LAW SINCE IT IS IMPOSSIBLE TO ASCERTAIN DUNN'S FINANCIAL CONDITION FROM THE RECORDS HE PROFERRED INTO EVIDENCE SHOULD BE AFFIRMED.

In closing we state that we have met the dictates of Chief Judge Mishler's order. Neither Dunn's records nor his testimony substantiates his claim to $123,000 due him from Mid-Island. Mr. Mann has failed to note the Bankruptcy Judge's statement as to what was agreed upon by counsel after the referral of the question back to him. See top of page 2 of the decision of February 19, 1974 (28A). Dunn's records do not meet the liberal standards still required by law or by Chief Judge Mishler for truly what we see is chaos.

CONCLUSION

The decision of Bankruptcy Judge Rudin dated February 19, 1974, and that of Chief Judge Mishler dated July 25, 1974, should be affirmed.

Respectfully submitted,

JACOB F. GOTTESMAN
Attorney for Trustee-Appellee

Received 3 copies of the within
Appellee Brief
this 12th day of Dec, 1924.

Sign M Connolly

For Levitt Weintraub Esq(s).

Att'ys for Bankrupt Appellee